

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the Application of:

Art Unit: **2856**

Andrew R. WEISENBERGER et al.

Application Number: **10/621,860**

Examiner: **Rodney T. Frank**

Filed: **July 16, 2003**

Confirmation No.: **1759**

For: **BUILDING MOISTURE CONTENT CERTIFICATION SYSTEM AND METHOD**

Attorney Docket Number: **062373**

Customer Number: **38834**

REPLY BRIEF UNDER 37 C.F.R. §41.41

MAIL STOP: APPEAL BRIEF-PATENTS

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

April 2, 2010

Sir:

Appellants submit the following in response to the Examiner's Answer mailed

February 3, 2010.

STATUS OF CLAIMS

Pending claims 1, 5-11, 13-18, 27-30, 35 and 36 stand rejected. Claims 2-4, 12, 19-26 and 31-34 have been cancelled. The claims on appeal are 1, 5-11, 13-18, 27-30, 35 and 36 as set forth in their entirety in Appendix A attached to the Brief on Appeal filed on November 16, 2009.

A. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The ground of rejection to be reviewed is the rejection of claims 1, 5-11, 13-18, 27-30, 35 and 36 under 35 U.S.C. §103 based on Rynhard et al., in view of Skidmore et al.

B. ARGUMENT

The rejection of claims 1, 5-11, 13-18, 27-30, 35 and 36 under 35 U.S.C. §103(a) based on Rynhart et al. in view of Skidmore et al. is improper and should be overturned.

As noted in the Brief on Appeal, claim 1 requires *measuring a plurality of moisture content levels within said interior portion of the structure; determining if each of said plurality of moisture content levels is within a desired level; and issuing a moisture level compliance certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level; wherein said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.* Independent claim 11 includes similar features.

On pages 5 and 6 of the Appeal Brief, it was submitted that Rynhart fails to disclose or fairly suggest the features of claim 1 concerning *measuring a plurality of moisture content levels within said interior portion of the structure; determining if each of said plurality of moisture content levels is within a desired level; and issuing a moisture level compliance certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level; wherein said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least*

one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.

In the Examiner's Answer dated February 3, 2010, in the "Grounds of Rejection" section of the Examiner's Answer, the Examiner repeats the same rejection as previously set forth in the Office Action dated October 15, 2008, pages 3-6.

In the "Response to Argument" section of the Examiner's Answer, the Examiner again fails to rely on any portion of the Rynhart reference for teaching the above-noted feature of claim 1.

Instead, on page 9 of the Examiner's Answer, the Examiner essentially takes the position that the Applicant has the burden of proof with regard to establishing that the claimed features are not a typical measurement process known in the art.

More specifically, the Examiner asserts that:

Further still, with respect to making such measurements at particular points such as window and door frames, ceilings, floors, etc., the applicant has not shown anywhere in the specification where these measurements are not a typical measurement process known in the art. In other words, there is no disclosure of any new method of performing moisture measurements for a home inspection, simply a method of taking these measurements and presenting them in a particular format of a compliance certificate. Thus, the measurement points would be obvious to one of ordinary skill in the art at the time of the invention, specifically since any openings such as a window or door would be of particular interest since they would be a prime location for possible moisture intrusion. (Emphasis added.)

However, it is submitted that the Examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness, which includes showing that the measurements

required in claim 1 are typical measurement process known in the art, which the Examiner has failed to even to attempt. Moreover, the Examiner's comments that the measuring points of the measuring step of claim 1 would be obvious to one of ordinary skill in the art at the time of the invention are equally without merit.

First, Rynhart fails to disclose or fairly suggest any measurement for either a door or a window. Thus, the Examiner again has failed to provide any reference, teaching or evidence to support this assertion and again has clearly failed to meet his burden of establishing a *prima facie* case of obviousness. In other words, the only teaching of taking moisture measurements *around at least one window frame and at least one door frame* is the Appellants' own specification, which of course amounts to **impermissible hindsight** by the Examiner.

Second, the Examiner has failed to even address the features of claim 1 concerning *wherein said measuring step includes taking measurements of said moisture content levels ... along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.* On page 10 of the Examiner's Answer, the

Examiner asserts that, "since the applicant has not requested withdrawal of the rejection of Rynhart in view of Skidmore, then the examiner is left to assume that the rejection is valid". However, it is respectfully submitted that the Examiner's position is without merit, since the Brief on Appeal clearly indicates on page 4, lines 7 and 8, that the rejection of claims 1, 5-11, 13-18, 27-30, 35 and 35 under 35 U.S.C. §103(a) based on Rynhart et al. in view of Skidmore et al. is improper and should be overturned.

With regard to Appellants' argument that the reference of Skidmore fails to cure the above noted drawbacks and deficiencies of the Rynhart reference with regard to the features set forth in claim 1 regarding *measuring a plurality of moisture content levels within said interior portion of the structure; determining if each of said plurality of moisture content levels is within a desired level; and issuing a moisture level compliance certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level; wherein said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure*, the Examiner fails to rely on any specific portion of the Skidmore reference that discloses or fairly suggests these features of claim 1.

Instead, the Examiner, on pages 11 and 12 of the Examiner's Answer in various parts asserts that:

[t]he Skidmore reference discloses moisture measurements being taken as part of a home inspection. ...

With this in mind, since Skidmore discloses making measurements to the interior of the structure, then one of ordinary skill in the art would know to make the measurements around all the particular points of interest, and thus Skidmore is of particular relevance to making such measurements for a home. ...

Further, paragraph [0023] specifically discloses a determination performed by a home inspector of the compliance of various aspects of the home inspection, one of said aspects being moisture level measurements as disclosed earlier in paragraph [0019].

However, as submitted in lines 3 and 4 on page 10 of the Appeal Brief, there is absolutely no disclosure in Skidmore of taking moisture content measurements during a home inspection.

That is, while Skidmore may disclose, for example, in paragraph [0019], that the system can be

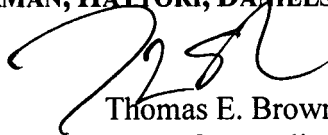
for inspecting a specific feature of the house such as stucco, mold, moisture, or other inspection items, Skidmore fails to disclose or fairly suggest that inspecting moisture issues is performed by taking moisture content measurements.

Thus, for at least the above reasons, Appellant requests that the Honorable Board reverse the Examiner's rejection.

If this paper is not timely filed, Appellant respectfully petitions for an appropriate extension of time. The fees for such an extension or any other fees that may be due with respect to this paper may be charged to Deposit Account No. 50-2866.

Respectfully submitted,

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